IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Criminal No. 2006-80**
GELEAN MARK,	)	
VERNON FAGAN,	)	
WALTER ELLS,	)	
DORIAN SWAN,	)	
KELVIN MOSES,	)	
HENRY FREEMAN, and	)	
EVERETTE MILLS,	)	
	)	
Defendants.	)	
_____	)	

ATTORNEYS:

Delia L. Smith, AUSA
St. Thomas, U.S.V.I.
For the Plaintiff,

Derek Hodge, Esq.
St. Thomas, U.S.V.I.
For the defendant Gelean Mark,

Kevin D'Amour, Esq.
St. Thomas, U.S.V.I.
For the defendant Vernon Fagan,

Carl R. Williams, Esq.
St. Thomas, U.S.V.I.
For the defendant Walter Ells,

Thurston T. McKelvin, FPD
St. Thomas, U.S.V.I.
For the defendant Dorian Swan,

Andrew L. Capdeville, Esq.
St. Thomas, U.S.V.I.
For the defendant Kelvin Moses,

Dale L. Smith, Esq.
New York, NY
For the defendant Henry Freeman,

Arturo R. Watlington, Jr., Esq.
St. Thomas, U.S.V.I.
For the defendant Everette Mills.

MEMORANDUM OPINION

Before the Court is defendant Kelvin Moses' ("Moses") motion for revocation or amendment of the Magistrate Judge's pretrial detention orders, entered on February 20, 2007, and April 9, 2007. For the reasons stated below, the Court will grant Moses' motion.

I. FACTS

On December 19, 2006, Moses was indicted for conspiracy to distribute a controlled substance and possession of a controlled substance on board an aircraft. The government moved for pretrial detention of Moses, pursuant to title 18, section 3142 of the United States Code ("Section 3142").

A. The January 3, 2007, Detention Hearing

The Magistrate Judge conducted a hearing on the government's pretrial detention motion on January 3, 2007. Moses was present and represented by counsel at the detention hearing. Drug

Enforcement Administration ("DEA") Agent Michael Goldfinger testified on behalf of the government. Agent Goldfinger stated that Moses had played a relatively minor role in the alleged conspiracy from approximately the year 2000 until 2005 or later. Moses allegedly acted as a courier, transporting money earned from narcotics sales back and forth between the U.S. Virgin Islands and the continental United States, and between the U.S. Virgin Islands and the British Virgin Islands. Moses was responsible for turning the proceeds from the drug sales over to defendants Gelean Mark ("Mark") and Henry Freeman ("Freeman"), who were both leaders of the charged conspiracy. A DEA investigation revealed that Moses made between ten and fourteen trips as a courier during 2006. Agent Goldfinger testified that Moses' arrest on the instant charges occurred without incident.

Prior to his arrest, Moses was a co-owner (together with Mark) and employee of M&M Cleaners. At the hearing, Agent Goldfinger testified that M&M Cleaners has not operated as a business for years. Agent Goldfinger also stated that the number associated with M&M Cleaners was actually a pager used by defendant Vernon Fagan ("Fagan") to call Mark.

Moses' criminal history includes an arrest in 1990 for third degree assault and a charge of distribution of crack cocaine in

1996. However, Moses was not convicted of either of those crimes. In fact, Moses has never been convicted of any criminal offense.

Moses is a naturalized citizen of the United States. He lives in St. Thomas, where he owns property as tenants by the entirety with his estranged wife. Moses is involved in a divorce proceeding in St. Thomas. The house he owns with his estranged wife is unfinished, and the property is valued at approximately $160,000.

Moses' mother, Daphne Fontaine ("Fontaine") testified at the hearing and offered to serve as third party custodian for Moses. Fontaine lives in St. Thomas with her husband and three grandchildren. Fontaine testified that she sees her son every day. She keeps a room in her house for Moses, and he often sleeps there since his house is under construction. When he does not sleep at his mother's house, she always calls him so she knows where he is. Fontaine indicated that Moses listens to her and obeys her. She stated that Moses has been unemployed since 2003, when he suffered a broken leg in Puerto Rico. Finally, Fontaine testified that she was aware of Moses' travels, but was not aware that he traveled as frequently as Agent Goldfinger suggested.

Halva Van Hennigan ("Hennigan"), a resident of St. Thomas who is unrelated to Moses, testified on his behalf at the January 3, 2007, detention hearing. Hennigan stated that he has known Moses for approximately thirty years. Hennigan stated that he was aware of Moses' arrest in this matter, but has never known him to be in any trouble before. Hennigan offered to serve as Moses' third party custodian. He owns real property, but it is tied up in a probate proceeding, so he cannot offer it as security for Moses' release. Hennigan did indicate, however, that if he had any property suitable to post as security, he would be willing to do so. Additionally, Hennigan stated that he knew Moses socially and saw him every week at cockfighting events. However, he did not know exactly where Moses resided.

Edcardo Emeric ("Emeric") also testified on Moses' behalf and offered to be his third party custodian if released pending trial. Emeric is a resident of St. Thomas who is unrelated to Moses, but has known him for approximately twenty to twenty-five years. Emeric testified that St. Thomas is Moses' home. Emeric is sixty-nine years old, and stated that Moses respects him. Emeric owns property with his ex-wife, but could not offer it as security because he needs her consent to do so.

Finally, Lecia Smith ("Smith"), defendant Freeman's mother, testified on Moses' behalf at the January 3, 2007, hearing. Smith owns two parcels of property in St. Thomas: one appraised at approximately $330,000, which she owns free and clear; and the other appraised at approximately $300,000, which carries a mortgage of approximately $153,000. At the hearing, Smith indicated that she would be willing to post one of these properties as security for Moses' release, as long as doing so would not prevent her from posting security for her son's release. Smith told the Magistrate Judge that she knew Moses well enough to be confident that he would not flee the territory pending trial. She stated that Moses was like a son to her.

On February 20, 2007, the Magistrate Judge granted the government's motion and ordered that Moses be detained pending further disposition of this matter.

B. The March 23, 2007, Detention Hearing

Moses moved for reconsideration of the detention order, and the Magistrate Judge conducted a second detention hearing on March 23, 2007. Again, Moses was present and represented by counsel. At the hearing, Moses proffered that his divorce had been finalized, so he now owned a 50% interest in his property in St. Thomas as a tenant in common with his wife, rather than as

tenants in the entirety. Moses then proffered that he would post his interest in his home as security for his release, and surrendered his passport to the Court. Moses presented letters of reference from local businesses that used the services of M&M Cleaning. One letter, was dated March 20, 2007, and signed by Grace Harrison, Church Administrator for Mt. Zion Church of God in St. Thomas. It described specific instances during the period from 1997 through 2004, when Moses personally performed cleaning services for the church as well as the New Testament Academy in St. Thomas. The second letter was signed by Dr. Sonia Taylor-Griffith of Children's Dental Care, Inc., in St. Thomas. Dr. Griffith indicated that Moses provided cleaning services through M&M Cleaning for the dentist's office from 2001 through 2004. The third letter, written by Dr. Audria A. Thomas of Allergy and Asthma Care, Inc. in St. Thomas, stated:

> Kelvin Moses is a young man that worked in my office for approximately five years. He performed cleaning services for my medical office. I found Mr. Moses to be trustworthy, dependable, honest and professional. Mr. Moses has always posed a friendly, pleasant and polite personality.
>
> The only reason that we did not maintain his services was because he injured his leg otherwise I would have his services to date. In fact, Mr. Moses has been the best cleaning service I have ever had.

(Dr. Thomas Letter, March 22, 2007.)

Urel A. Rogers ("Rogers") also testified on Moses' behalf at the March 23, 2007, hearing. Rogers lives in St. Thomas, he has known Moses for approximately ten years. He is not a member of Moses' family. Rogers co-owns property on St. Thomas with his brother, which he offered to post as security for Moses' release. The tax-assessed value of the property is $75,000. Rogers' brother could not attend the detention hearing, but Rogers stated that they had discussed posting the property as security for Moses' release and both were willing to do so. It was proffered that Rogers' brother had agreed to come to court and execute any documents required to post the property as security. Rogers stated that he was aware of Moses' arrest in this matter. Nonetheless, he expressed confidence that Moses would not flee the territory pending trial. When asked by the defense counsel whether he considered Moses to be of good moral character, Rogers stated that he had never had any problems with Moses, nor had he ever known Moses to have any problems with anyone else.

The government presented no evidence at the March 23, 2007, hearing. On April 9, 2007, the Magistrate Judge again ordered that Moses be detained pending trial.

On April 20, 2007, Moses moved for revocation or amendment of the Magistrate Judge's detention orders, which he renewed on June 1, 2007.

II. DISCUSSION

Title 18, section 3145(b) of the United States Code ("Section 3145(b)") provides that a person who has been ordered to be detained pending trial by a magistrate judge may move for revocation or amendment of the detention order in the court with original jurisdiction over the matter. 18 U.S.C. § 3145(b) (1990). "When the district court acts on a motion to revoke or amend a magistrate's pretrial detention order, the district court acts *de novo* and must make an independent determination of the proper pretrial detention or conditions for release." *United States v. Rueben*, 974 F.2d 580, 585-86 (5th Cir. 1992); *cf. United States v. Delker,* 757 F.2d 1390, 1394 (3d Cir.1985) (holding that the Bail Reform Act, 18 U.S.C. § 3145(b), *et seq.,* contemplates *de novo* review by the district court of a magistrate's order for bail pending trial). Under this standard, "a district court should not simply defer to the judgment of the magistrate. . . ." *United States v. Leon,* 766 F.2d 77, 80 (2nd Cir. 1985) (noting that a reviewing court "should fully reconsider a magistrate's denial of bail").

In conducting a *de novo* review of a magistrate judge's pretrial detention order, the court may rely on the evidence presented before the magistrate judge. *See United States v. Koenig,* 912 F.2d 1190, 1193 (9th Cir. 1990) ("[T]he district court is not required to start over in every case . . . ."); *United States v. Chagra*, 850 F. Supp. 354, 357 (W.D. Pa. 1994) (noting that the court may incorporate the records of the proceedings and the exhibits before the magistrate judge). Though not required to do so, the reviewing court may, in its discretion, choose to hold an evidentiary hearing if necessary or desirable to aid in the determination. *See Koenig,* 912 F.2d at 1193; *see also United States v. Lutz*, 207 F. Supp. 2d 1247 (D. Kan. 2002) (*"De novo* review does not require a *de novo* evidentiary hearing.").

III. ANALYSIS

Moses argues that the evidence presented at the detention hearings on January 3, 2007, and March 23, 2007, supports the conclusion that he should be released pending trial.

Pretrial detention of a criminal defendant will be ordered only if, after a hearing upon motion by the government, a "judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as

required and the safety of any other person and the community." 18 U.S.C. § 3142(e) (2006). Furthermore, a finding by the judicial officer that there is probable cause to believe the defendant committed "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 *et seq*.)" raises the rebuttable presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." *Id.*

The fact that a defendant has been indicted for a crime carrying a maximum prison term of ten years or more under the Controlled Substances Act is sufficient to support a finding of probable cause, triggering the rebuttable presumption in favor of pretrial detention. *See United States v. Suppa*, 799 F.2d 115, 119 (3d Cir. 1986) ("[B]ecause an indictment . . . conclusively demonstrates that probable cause exists to implicate a defendant in a crime, [t]he indictment, coupled with the government's request for detention, is a sufficient basis for requiring an *inquiry* into whether detention may be necessary." (internal citations and quotations omitted)).

> The showing of probable cause (by means of an indictment) *may* be enough to justify detention if the defendant fails to meet his burden of production, or if the government's showing is sufficient to countervail the defendant's

> proffer, . . . but it will not necessarily be enough, depending upon whether it is sufficient to carry the government's burden of persuasion.

Id. (quoting *United States v. Hurtado*, 779 F.2d 1467, 1478 (11th Cir. 1985)) (emphasis in original). To rebut the statutory presumption in favor of detention, a defendant must produce "some credible evidence" to assure his presence before the court and the safety of the community.

The determination of whether any conditions of release can reasonably assure the defendant's appearance in court and the safety of others is based on the following four factors:

> (1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person and the community that would be posed by the person's release.

United States v. Traitz, 807 F.2d 322, 324 (3d Cir. 1986) (citing 18 U.S.C. § 3142(g) ("Section 3142(g)")); *see also United States v. Coleman*, 777 F.2d 888, 892 (3d Cir. 1985).[1] To justify

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[1] The sub-factors relevant to the consideration of a defendant's characteristics and history include:

> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law . . . .

pretrial detention, the government must establish risk of flight by a preponderance of the evidence, and dangerousness by clear and convincing evidence. *See United States v. Himler*, 797 F.2d 156, 160-61 (3d Cir. 1986); 18 U.S.C. § 3142(f); *Traitz,* 807 F.2d at 324.

Here, Fontaine's testimony demonstrated that Moses had family ties in St. Thomas. Additionally, Moses presented the testimony of four members of the community who were not members of his family, yet did not hesitate in expressing their confidence that Moses would not flee pending trial. Emeric emphasized that St. Thomas was home to Moses. Indeed, Moses surrendered his passport to the Court, offered his own 50% interest in his house in St. Thomas as security for his release. Moses has no prior convictions, was arrested without incident on the instant charges, none of which involve acts of violence or weapons of any kind.

Furthermore, two community members who are unrelated to Moses offered their residential properties as security for his release. This further supports Moses' argument that he is not a flight risk, and also indicates that these members of the community think highly of Moses' character. *See United States v.*

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18 U.S.C. § 3142(g)(3).

Carbone, 793 F.2d 559, 561 (3d Cir. 1986) ("Although posting a property bond normally goes to the question of defendant's appearance at trial, where the surety takes the form of residential property posted by [non-family] community members[,] the act of placing this surety is a strong indication that the private sureties are also vouching for defendant's character."). The letters from the local church, dentist's office, and doctor's office verified Moses' employment with M&M Cleaning, and weighed in favor of his good character and against his propensity for dangerousness. *See United States v. Perry,* 788 F.2d 100, 115 (3d Cir. 1986) (explaining that the type of evidence that may be adequate to rebut the presumption of dangerousness includes "testimony by co-workers, neighbors, family physician, friends, or other associates concerning the arrestee's character, health, or family situation").

The government's evidence showed that Moses played a minor role as a courier in the charged conspiracy. *Contra United States v. Martir,* 782 F.2d 1141, 1147 (2d Cir. 1986) ("The government's informal proffer that he was the mastermind of a narcotics scheme tended to show that [the defendant] not only had reason to expect a greater sentence than his co-defendants, but also had greater opportunities to flee due to greater wealth and better contacts."). Though he was not a leader in the conspiracy,

Moses' responsibilities did revolve around traveling undetected in and out of the territory.

After reviewing the evidence below in light of the factors outlined in Section 3142(g), the Court finds that Moses has rebutted the statutory presumption against pretrial release. The government has failed to meet its burden of persuading the Court that no condition or combination of conditions could reasonably assure Moses' release. *See, e.g., Carbone,* 793 F.2d at 561 (holding that the defendant, indicted on drug conspiracy charges, rebutted the statutory presumption and was entitled to pretrial release where he had no criminal record, he had an offer of employment pending trial, he consented to confinement in his parents' home outside work hours, and [non-family] community members offered to post $1,000,000 in residential property as security for his release); *Cirillo,* 1999 WL 1456536 at *2 (finding that the defendant, a Canadian citizen and resident indicted on drug conspiracy charges had rebutted the presumption and was entitled to pretrial release where he had strong family ties, no criminal record, a history of employment in an established family business, and he had signed an irrevocable waiver of extradition); *cf. United States v. Suppa,* 799 F.2d 115, 119-120 (holding that the defendant, charged with conspiracy to distribute cocaine, failed to rebut the statutory presumption

against pretrial release where he presented no testimony by co-workers, neighbors, family physicians, friends or other associates showing that he would not pose a danger to the community upon release).

IV. CONCLUSION

For the foregoing reasons, the Court will remand this matter to the Magistrate Judge to assess and determine what, if any, condition or combination of conditions would reasonably assure the appearance of the defendant and the safety of the community. An appropriate order follows.

Dated: August 25, 2007

S_____
CURTIS V. GÓMEZ
Chief Judge

Copy: Hon. Geoffrey W. Barnard
Delia L. Smith, AUSA
Kevin D'Amour, Esq.
Derek Hodge, Esq.
Carl R. Williams, Esq.
Thurston T. McKelvin, FPD
Jesse Gessin, AFPD
Andrew L. Capdeville, Esq.
Dale L. Smith, Esq.
Arturo R. Watlington, Jr., Esq.

Mrs. Trotman
Ms. Donovan
Mrs. Schneider
Probation
U.S. Marshals
Bailey Figler, Esq.